

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 481/1999

MINISTER OF SAFETY & SECURITY **1st Applicant/Defendant**

NATIONAL COMMISSIONER

OF THE SOUTH AFRICAN POLICE

SERVICE **2nd Applicant/Defendant**

DETECTIVE SERGEANT MCEBISI

KATSHULA **3rd Applicant/Defendant**

and

MLAMLI NDABA **Respondent/Plaintiff**

JUDGMENT

BROOKS J

[1] This is an application in which the applicants seek the following relief:

“1. That the Plaintiff’s action against the Defendants in case 481/99 be and is hereby dismissed for want of prosecution or inordinate delay in the prosecution thereof.

That the Plaintiff pays the costs of this application only in the event of his opposition thereof.”

[2] These being application proceedings in which the applicants, who are the defendants in the action, seek final relief, their entitlement thereto is to be determined upon an assessment of those allegations made in their founding affidavit which have been admitted by the respondent in his answering affidavit read together with the allegations made by him therein.¹

[3] In his opposition, the respondent raises a preliminary point *in limine* which is expressed in the following terms:

“6.1 The founding affidavit is lacking in facts and evidence demonstrating that the deponent has the necessary authority to institute the interlocutory application for and on behalf of the 1st and 2nd defendants/applicants.

6.2 The authority of the deponent is therefore placed in issue.”²

[4] In argument on the point, Mr NKUBUNGU, who appeared on behalf of the respondent, submitted that the mere say-so of the deponent to the founding

¹ NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 (SCA) par [26].

² Par 6 of the answering affidavit.

affidavit is insufficient proof of either delegation or authority without submitting acceptable evidence or documentation to substantiate the averment.³

[5] The relevant portion in the founding affidavit ⁴reads as follows:

“1.2 I am an adult male in the employ of the 1st Defendant, holding the rank of a Colonel in the South African Police Force and I am the co-ordinator of civil claims against the Police in all the former Transkei area, with offices at 11th Floor PRD Building, Sutherland Street, Mthatha.

1.3 I am duly authorised by the 1st and 2nd Defendants, who have duly resolved to bring this application, to depose to this affidavit on their behalf.”

[6] In meeting the argument, Mr ZILWA, who appeared on behalf of the applicants, stressed that the challenge was apparently to the deponent’s authority to institute the application, not his authority to depose to the founding affidavit. Indeed this is plain from the answering affidavit⁵. The deponent made no claim to having authority to institute the proceedings. He stated clearly that it was the first and second defendants who had duly resolved to bring the application. To this statement the applicant had made no challenge. Accordingly this matter is to be distinguished from the authorities upon which the respondent placed reliance ⁶and which deal with the need for a deponent who claims direct authority to institute proceedings, or a delegation of power to

³ Reliance was placed upon *EVELTH v MINISTER OF HOME AFFAIRS* [2004] 3 ALL SA 322 (T) 326 par [9] and *KASIYAMHURU v MINISTER OF HOME AFFAIRS & OTHERS* 1999 (1) SA 643 (W) 649 A-B.

⁴ Par 1 of the founding affidavit.

⁵ Note (2) *supra*.

⁶ Note (3) *supra*.

institute proceedings, to place evidence or documentation before the court to substantiate the averment.

[7] In the present matter there can be no uncertainty about the authority of the defendants to institute these proceedings and no documentation is required to substantiate the averment that they have duly resolved to do so. It is not necessary for the deponent to attach proof of his authorisation to depose to the affidavit. Read with his description of the position he holds within the South African Police Services, his statement under oath that he is authorised to depose to the affidavit is sufficient. In my view, there is no merit in the point raised in *limine*.

[8] It has been held ⁷that an inordinate or unreasonable delay in prosecuting on action may constitute an abuse of process and warrant the dismissal of an action. The approach to be adopted in the consideration of whether or not to dismiss an action in such circumstances has been expressed by BORUCHOWITZ AJA on behalf of the full court of the Supreme Court of Appeal ⁸as follows:

“There are no hard-and-fast rules as to the manner in which the discretion to dismiss an action for want of prosecution is to be exercised. But the following requirements have been recognised. First, there should be a delay in the prosecution of the action; second, the delay must be inexcusable; and, third, the defendant must be seriously prejudiced thereby. Ultimately, the enquiry

⁷ VERKOUTEREN v SAVAGE 1918 AD 143 at 144; KUIPER AND OTHERS v BENSON 1984 (1) SA 474 (W) 476 H–477B; BISSET AND OTHERS v BOLAND LTD AND OTHERS 1991 (4) SA 603 (D) 608 C–E; MOLALA v MINISTER OF LAW AND ORDER AND ANOTHER 1993 (1) SA 673 (W) 676 B–679 I; GOPAUL v SUBBAMAH 2002 (6) SA 551 (D) 558 F–G; SANFORD v HALEY NO 2004 (3) SA 296 (C) par [8]; GOLDEN INTERNATIONAL NAVIGATION SA v ZEBRA MARITIME CO LTD; ZEBRA MARITIME CO LTD v MV VISVLIET 2008 (3) SA 10 (C); ZAKADE v THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA [2010] JOL 25868 (ECB); CASSIMJEE v MINISTER OF FINANCE 2014 (3) SA 198 (SCA) par [10]

⁸ CASSIMJEE v MINISTER OF FINANCE 2014(3) SA 198 (SCA) par [11].

will involve a close and careful examination of all the relevant circumstances, including the period of the delay, the reasons therefor and the prejudice, if any, caused to the defendant. There may be instances in which the delay is relatively slight but serious prejudice is caused to the defendant, and in other cases the delay may be inordinate but prejudice to the defendant is slight. The court should also have regard to the reasons, if any, for the defendant's inactivity and failure to avail itself of remedies which it might reasonably have been expected to use in order to bring the action expeditiously to trial."

[9] A perusal of the authorities ⁹reveals scant regard for the constitutional climate within which the court is called upon to exercise its discretion in matters of this nature. The exception is to be found in the dicta of MOOSA J ¹⁰who has held that the court will exercise its power to dismiss an action on account of the delay or want of prosecution only in exceptional circumstances "because the dismissal of an action seriously impacts on the constitutional and common-law right of a plaintiff to have the dispute adjudicated in a court of law by means of a fair trial."

[10] Section 34 of the Constitution ¹¹provides, as part of the Bill of Rights, that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent or impartial tribunal or forum"

[11] Section 39(2) of the Constitution ¹¹enjoins our court in interpreting and when developing the common law or customary law, to promote the "spirit, purport and objects of the Bill of Rights." Even under common law, our courts

⁹ Note (7) *supra*

¹⁰ SANFORD v HALEY NO 2004 (3) SA 296 (C) par [8]

¹¹ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 108 of 1996.

are open to all and it is only in very exceptional circumstances that the doors of the court will be closed upon anyone who desires to prosecute an action.¹²

[12] In my view, to the helpful summary of factors which fall for consideration in matters of this nature that has been expressed by BOROUCHOWITZ AJA¹³ should be added that the power that the court has to dismiss an action for want of prosecution, being a power to regulate its own processes in terms of the provisions of s173 of the Constitution¹⁴, is a power which has to be exercised with caution¹⁵ and sparingly having taken into account the interests of justice in a manner consistent with the Constitution.¹⁶

[13] In the action instituted by the respondent in this matter, damages are claimed in respect of an alleged unlawful deprivation by servants of the applicants of the respondent's liberty and freedom of movement, causing an impairment of his dignity. In essence, the respondent's claim is based upon an alleged infringement of some of his constitutional rights as protected by the Bill of Rights. In my view, the nature of the respondent's claim is a factor to which regard must be had in accordance with the principle that all law in this country must be grounded in constitutional values set out in the Bill of Rights.¹⁷

[14] Moreover, the potential which the relief sought holds to have a devastating effect upon the respondent's right of access to justice, to have his

¹² WESTERN ASSURANCE Co v CALDWELL'S TRUSTEE 1918 AD 262 at 277; SCHOEMAN EN ANDERE v VAN TONDER 1979 (1) SA 305 (O) 305 F; FISHERIES DEVELOPMENT CORPORATION v AWJ INVESTMENTS 1979 (3) SA 1331 (W) 1338 F –G; BISSET AND OTHERS v BOLAND BANK LTD AND OTHERS 1991 (4) SA 608 D-F.

¹³ Note (8) supra.

¹⁴ Note (11) supra

¹⁵ S v PENNINGTON AND ANOTHER 1997 (4) SA 1076 (cc).

¹⁶ PARBHOO AND OTHERS v GERTZ NO AND ANOTHER 1997 (4) SA 1095 (CC).

¹⁷ CITY OF CAPE TOWN v SANRAL AND 10 OTHERS 2015 (5) BCLR 560 (SCA) par [31].

case decided in a fair public hearing before a court, must be a factor which is taken into account. In this regard, the court must be mindful of the approval given by the Constitutional Court ¹⁸to an approach to be fundamental rights enshrined in the Bill of Rights which, whilst paying due regard to the language that has been used, should be “generous” and “purposive” and “ give expression to the Constitution”. The requirements of this approach are satisfied by the observation, in matters of this nature, of the common law principle that the courts of law are open to all and it is only in very exceptional circumstances that the doors of the court will be closed upon anyone who desires to prosecute an action.¹⁹

[15] The applicants contend that the delays demonstrated in the conduct of this matter by the respondent are “extensive and inexcusable” and have prejudiced the applicants in their ability to defend the action.

[16] Upon an application of the relevant principles ²⁰the following facts are relevant to a determination of the applicant’s entitlement to the final relief sought:

- the respondent’s cause of action is alleged to have arisen on 17 October 1997;
- prior to October 1997 the respondent was employed by Ncora Irrigation Scheme in the district of Cofimvaba. The

¹⁸ S v ZUMA AND OTHERS 1995 (2) SA 642 (CC) par [15]; S v MAKWANYANE 1995 (3) SA 391 (CC) par [9].

¹⁹ Note (12) supra.

²⁰ Note (1) supra

liquidation of this scheme led to his retrenchment in March 1997;

- the combined summons was issued on 12 March 1999;
- initially, the respondent utilised his savings and his retrenchment package to fund the litigation;
- a plea was filed on behalf of the applicants in which a special plea was raised to the effect that the respondent had failed to comply with the provisions of s 57 of the South African Police Services Act 68 of 1995;
- thereafter followed an application by the applicants for an order in terms of Rule 33(4) of the Uniform Rules of Court directing that the issue in the special plea be argued separately from the merits of the action, the latter to be postponed to a later date;
- as early as 25 February 2000 the respondent's initial attorneys addressed a letter to him, a copy of which is attached to the answering affidavit, in which it was indicated that the matter was set down for trial on 31 May 2000 and that the respondent was required to call at the attorneys' offices to make arrangements for the payment of legal fees and disbursements;

- the respondent's inability to make payment of legal fees led to the withdrawal of his attorneys as attorneys of record on 22 August 2000;
- leave was obtained from the registrar of this court for the respondent to proceed *in forma pauperis* and a notice of acting was filed by his new attorneys on 16 October 2000;
- the issue with which the special plea was concerned came before court on 20 October 2000 when an order was made directing the respondent to apply for condonation for the late institution of the proceedings such application to be brought in accordance with the provisions of s 57 (5) of the South African Police Services Act 68 of 1995 within thirty days. The respondent, notwithstanding the *in forma pauperis* status of his circumstances, was ordered to pay the costs;
- on 4 February 2001 the respondent's attorneys of record addressed a letter to him advising that the matter had been set down by the applicants on 8 February 2001. A copy of the letter is attached to the answering affidavit. It records further that the attorneys had found it impossible to secure an advocate who was prepared to conduct the matter on an *in forma pauperis* basis. The statement is made that on "the last occasion which was on 20th October 2000 and 30th November 2000" assistance was obtained from two advocates "and this cannot happen any more". In the circumstances a notice of withdrawal as attorneys of record was attached;

- the respondent again approached the registrar of this court *in forma pauperis* and on 12 June 2001 new attorneys of record filed their notice of acting;
- on 15 June 2001, with the respondent being duly represented by an advocate, the following order was issued in favour of the respondent:

“That the application for condonation is granted and Defendant is ordered to pay costs of the Plaintiff”;

- contemporaneously, the respondent’s new attorneys of record informed him that they needed to “co-ordinate and construct” his file, “study and assimilate the pleadings and, where necessary, collect supporting documents and evidence relevant” to his case;
- the respondent decided to afford his attorneys a period of two months, after which he “frequented” their office. He states that each time he went there he was either told that the attorney was busy and that he should “come some other time” or that the attorney was still busy “collecting relevant documentation and evidence for use in a trial.”;
- ultimately, “realising that there was no progress in the prosecution of the matter”, the respondent reported the unsatisfactory circumstances in which he found himself to the registrar of this court;

- thereafter, intermittent visits were made to the registrar's office;
- on 18 February 2008 the respondent completed an affidavit in terms of Rule 40 of the Uniform Rules of Court for leave to bring his action *in forma pauperis* and the registrar attached a copy thereof to a letter addressed to yet another firm of attorneys, asking them to conduct an enquiry into the respondent's means;
- armed with this documentation the respondent approached the new attorneys "not having a single document regarding papers already filed";
- the respondent was told by his attorneys "to arrange an appointment." When he ultimately secured a consultation he was informed that the attorneys "would first have to go through certain formalities to obtain the file, study it and place themselves on record before calling [him] for further consultation.";
- on 12 May 2008 the new attorneys addressed a letter to the registrar of this court indicating that the action had reached the stage where a conference in terms of Rule 37 of the Uniform Rules of Court was due to be arranged and that the previous attorneys were still on record as acting for the respondent. The letter concludes with the statement that "we will gladly be of assistance provided your office instructs the

present attorneys of record to file their withdrawal notice so that we can file our notice of acting.”;

- on 11 June 2008 the new attorneys addressed a letter to the attorneys who still remained on record requesting them to file a notice of withdrawal;
- on 29 August 2008 a notice of withdrawal was filed;
- thereafter, the respondent’s new attorneys called him to a consultation and informed him that they were “rather loath to place themselves on record before obtaining a record of criminal proceedings from the Engcobo Magistrate Court to see if the said record will in any case support [the] cause of action.”;
- it is the respondent’s belief that his new attorney personally drove to Ngcobo on diverse occasions to obtain the record as he experienced difficulty in communicating with the relevant office and in getting co-operation. It is apparent that on each occasion the attorney was informed that the record was “in the archives and officials had no time to get there because of the pressure of work.”;
- towards the end of May 2012 the respondent’s attorney received the hand-written notes of the proceedings, made by the magistrate, ascertained that they were incomplete and requesting a transcribed record of the proceedings;

- on 15 June 2012 the court manager at Ngcobo wrote to the respondent's attorney and informed them that during 1997 there was no mechanical recording in the district courts and accordingly what had already been sent to the attorneys constituted the only records of the proceedings;
- on 13th July 2012 the respondent's attorneys filed a notice of acting as attorneys of record;
- discovery of the charge sheet and the incomplete record of proceedings received from Ngcobo was then made;
- on 6 June 2014 the respondent's attorneys of record addressed a letter to the applicants' attorneys of record pointing out that discovery had been made and requesting from them an indication that they still held instructions as the applicants' attorneys of record;
- on 17 June 2014 the applicants' attorneys' of record requested the respondent's attorneys of record to furnish them with copies of previous correspondence because they "had to dig down before getting some of the file contents herein.";
- on 1 April 2015 a conference was held between the parties' legal representatives in accordance with the provisions of Rule 37 of the Uniform Rules of Court ;

- no concerns were raised by the applicants' attorneys of record about prejudice caused by undue delays when the Rule 37 conference was held;
- on 13 July 2015 the respondent's attorneys of record served a request for particulars for trial in accordance with the provisions of Rule 21 of the Uniform Rules of Court;
- on 16 July 2015 the applicants' attorneys of record addressed a letter to the respondent's attorneys of record indicating that as "this is an old matter, we will have to take instructions on your request." An indulgence of further time was requested;
- on 20 July 2015 the respondent's attorneys of record addressed a response in which it was stated that an indulgence of one month would be granted after which a written request would be expected if any further indulgence were to be sought;
- no further indulgence being sought on behalf of the applicants, and there being no response to the respondent's request for particulars for trial, the respondent's attorneys of record made application to the registrar of this court for the allocation of a trial date;
- the registrar allocated 27 November 2015 as a trial date;

- on 27 November 2015 the matter was postponed *sine die* at the instance of the applicants who were ordered to pay the wasted costs occasioned by the postponement;
- on 3 February 2016 the respondent's attorneys of record again made application to the registrar of this court for the allocation of a trial date;
- the registrar allocated 19 May 2016 as a trial date;
- on 11 May 2016, during the week preceding the allocated trial date and in accordance with local rules of practice, both the attorneys for the applicants and the attorneys for the respondent attended the meeting with the Deputy Judge President to indicate whether the matter was ready to be enrolled and to proceed to trial on 19 May 2016;
- no complaint about undue delays in the prosecution of the respondent's action causing prejudice to the applicants was ever raised before the present application was launched on 17 May 2016.

[17] In the founding affidavit the applicants allege that the "inordinate delay in prosecuting the action has had a detrimental effect on the Defendants and their ability to defend the action." This allegation is developed to claim that "all relevant records pertaining to the alleged cause of action have since become untraceable, that all possible witnesses have either since died, resigned, retired and became untraceable."(*sic*). Lastly, the applicants claim that they have established that the person cited by the respondent in the action as the third

defendant, the police officer who is alleged to have laid false charges against the respondent which led to his arrest and detention, “is unknown and has never been employed by the South African Police Services or Force at any stage.”

[18] Assessing the facts relating to the delay in the progress of the prosecution of the action, it is evident that indeed there are significant periods of time in which the prosecution of the action appears to have stagnated. However, the question to be asked is whether these periods of time are indicative either of vexatious delaying tactics on the part of the respondent, or of a dilatoriness that amounts to an abuse of the court process, or of a level of disinterest on the part of the respondent which amounts to an abandonment of his claim.

[19] In my view it is a significant factor, which must be taken into account, that the respondent expended his savings and his retrenchment package in the initial funding of the litigation. On his own allegations, his difficulties commenced when he ran out of funds and was obliged to seek leave to prosecute his action *in forma pauperis*. He states that this deprived him of the power to maintain the momentum of the prosecution of the action. It is a sad indictment on the organised legal profession that the facts in this matter demonstrate that the respondent is justified in holding this view. There can be little doubt that much of the inactivity evident in the history of the matter as set out in the answering affidavit can be attributed directly to the reality that, with its *in forma pauperis* character, the respondent’s action was not prioritised, presumably because it did not immediately generate fees. Accordingly, it is his circumstances, rather than inactivity on his own part, that denied him access to justice over significant periods of time.

[20] As an *in forma pauperis* litigant who would appear not to have a sophisticated background, the battle between the respondent and the organised legal profession must at times have seemed like the unequal Biblical battle between David and Goliath. However, even if there is room for criticism of an apparent delay on the part of the respondent in taking the issue of a lack of progress either with his attorneys, or with the registrar of this court, in my view the delays do not amount to an abuse of the court process. The matter has been enrolled on the civil trial roll on a number of occasions, with the applicants' plea of prejudice due to a delay in prosecution emerging only belatedly.

[21] The respondent deals, as he must, in the answering affidavit with the allegations relating to the prejudice alleged to have been suffered by the applicants. He makes the point that as early as 18 July 2000 the applicants filed an amended plea based upon information and records at their disposal. There has been no change in the applicants' legal representation. It is reasonable to assume that consultations were held prior to the drafting of the amended plea and it would be reasonable to expect that statements taken from witnesses at the time, or at the very least a list those witnesses, would have been retained. Accordingly, if only at pre-trial stage the applicants are endeavouring to obtain evidential material and are experiencing difficulty therein, responsibility for such difficulty cannot be laid unequivocally at the door of the respondent. In my view, there is merit in the response of the respondent on this point.

[22] Sight must not be lost of the discovery by the respondent of such record as exists of the relevant court proceedings in the Magistrate's Court for the district of Ngcobo. A copy thereof is annexed to the answering affidavit. Although recorded in manuscript, it is a legible document which discloses the

evidence of one Mcebisa Katshila, who arrested the respondent. In his particulars of claim the respondent alleges that he was arrested by one Mcebisi Katshila, who was a detective sergeant in the employ of the South African Police Service. In the amended plea, the arrest of the respondent by a member of the South African Police Service is admitted. Whilst the respondent is therein put to the proof of his or her identity, the plea does not claim that the individual named was never employed by the South African Police Service. Prima facie, whilst the respondent may wish to introduce an alternative spelling to the name of the third defendant by way of an amendment in accordance with the provisions of Rule 28 of the Uniform Rules of Court, the protest made by the applicants in the founding affidavit relating to a lack of connection between the third defendant and the South African Police Force appears to be disingenuous.

[23] In my view, although adopted in the absence of a respondent who carried the additional burden of neglect by the organised legal profession as an *in forma pauperis* litigant, the approach of Gordon J demonstrated in the following dicta commends itself to the present matter:

“In my view, the power to strike out the claim will be used only in exceptional cases, as stated in the cases referred to above, and then only where there has been a clear abuse of the process of Court.

In the present case, while I consider the plaintiff’s conduct reprehensible, I am unable to say that his action is so tainted as to amount to an abuse of process. Despite his delays, he had in fact consulted a number of attorneys, and whatever the causes of the problems with his attorneys and counsel may have been, I do not consider that the doors of the Court should, at this late stage, be closed to him. Should the case proceed, the trial Court would be in a position

to take all relevant factors into account, including the factor of prejudice to defendants.”

[24] It follows that the application cannot succeed.

[25] The following order is made:

“The application to dismiss the plaintiff’s action against the defendants under case number 481/1999 is dismissed with costs.”

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances

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Date heard:

13 October 2016

Date delivered:

10 November 2016